Pacific & Orient Insurance Co Bhd v Vigneswaran a/l Rajarethinam & Ors

HIGH COURT (PULAU PINANG) — ORGINATING SUMMONS NO 24–1362–07 OF 2012
ZAMANI A RAHIM J
3 JULY 2013

Insurance — Motor insurance — Policy of insurance — Application by insurer to declare policy unenforceable by Insured and plaintiffs in running-down action — insured made statutory declaration ('SD') and police report and testified in running-down action denying accident took place — Admission by insured in SD that initial police report confirming accident took place false to enable plaintiffs to make fraudulent claim against insurer — Road Transport Act 1987 s 96(3)

The plaintiff was the insurer of a motorcycle owned by the first defendant ('the insured') against third party claims. The second and third defendants sued the insured in the sessions court alleging that the latter had, whilst riding his motorcycle, collided into them causing them injury, loss and damage. The insured had initially lodged a police report ('initial police report') admitting that the accident took place but during the sessions court proceedings he denied his motorcycle was involved in any collision with the second and third defendants. He affirmed a statutory declaration ('SD') to that effect and also stated that he was paid RM300 to make his initial police report to enable the second and third defendants to make a false claim against the plaintiff. The insured made a second police report confirming that his motorcycle was not involved in any accident with the second and third defendants. No affidavit was filed by the second or third defendants denying the facts averred to by the insured in his SD or in his second police report. The plaintiff's instant application pursuant to s 96(3) of the Road Transport Act 1987 sought a declaration that the policy of insurance concerned was unenforceable against it by the insured and the other defendants and that it was entitled to repudiate liability for the 'accident' in question.

Held, granting the application:

(1) The insured's conduct in allowing his motorcycle to be used to make a non-existent claim fell clearly within the exceptions to liability under the policy. The plaintiff was not liable to indemnify the insured for any losses arising from his entering into an agreement with the second and third defendants to make a false claim against the plaintiff. There was no rebuttal evidence from the second and third defendants denying the contents of the insured's SD. The plaintiff was also not liable for an accident which did not occur (see paras 6–7).

(2) The insured had breached the duty to exercise utmost good faith in his contract with the plaintiff and by committing an unlawful act of involving himself in the fabrication of a false claim upon the plaintiff, he and the other defendants should not be allowed to benefit from his/their dishonest and illegal act (see paras 7, 8, 10 & 12).

[Bahasa Malaysia summary

Plaintif adalah syarikat insurans motosikal yang dimiliki oleh defendan pertama ('pihak diinsuranskan') terhadap tuntutan pihak ketiga. Defendan kedua dan ketiga menyaman pihak diinsuranskan di mahkamah sesyen mendakwa bahawa, semasa menunggang motosikalnya, melanggar dan menyebabkan mereka mengalami, kerugian dan kerosakan. Pihak diinsuranskan pada mulanya membuat laporan polis ('laporan awal polis') mengakui bahawa kemalangan itu berlaku tetapi semasa prosiding di mahkamah sesyen beliau menafikan motosikalnya terlibat dalam apa-apa perlanggaran dengan defendan kedua dan ketiga. Dia mengesahkan akuan berkanun ('AK') bagi maksud tersebut dan juga menyatakan bahawa dia dibayar RM300 untuk membuat laporan awal polis beliau bagi membolehkan defendan kedua dan ketiga membuat tuntutan palsu terhadapnya. Pihak diinsuranskan membuat laporan polis kedua yang mengesahkan bahawa motosikalnya tidak terlibat dalam apa-apa kemalangan dengan defendan kedua dan ketiga. Tiada afidavit difailkan oleh defendan kedua atau ketiga menafikan fakta-fakta yang diakui oleh pihak diinsuranskan di dalam AK atau di dalam laporan polis yang kedua. Permohonan plaintif menurut s 96(3) Akta Pengangkutan Jalan 1987 memohon deklarasi bahawa polisi insurans berkenaan tidak boleh dikuat kuasakan terhadapnya oleh pihak diinsuranskan dan defendan-defendan dan bahawa ia berhak untuk menolak liabiliti untuk 'kemalangan' yang berkenaan.

Diputuskan, membenarkan permohonan:

(1) Kelakuan pihak diinsuranskan dalam membenarkan motosikal digunakan untuk membuat tuntutan yang tidak wujud jatuh dengan jelas dalam pengecualian kepada liabiliti di bawah polisi. Plaintif tidak bertanggungan untuk menanggung rugi pihak diinsuranskan untuk apa-apa kerugian yang timbul daripada memasuki ke dalam perjanjian dengan defendan kedua dan ketiga untuk membuat tuntutan palsu terhadap plaintif. Tiada bukti bantahan daripada defendan kedua dan ketiga menafikan kandungan AK pihak diinsuranskan. Plaintif juga tidak bertanggungjawab ke atas kemalangan yang tidak berlaku (lihat perenggan 6–7).

(2) Pihak diinsurankan telah melanggar kewajipan untuk melaksanakan penuh suci hati dalam kontraknya dengan plaintif dan dengan melakukan perbuatan menyalahi undang-undang dengan melibatkan dirinya dalam mengada-adakan tuntutan palsu kepada plaintif, dia dan

defendan-defendan lain tidak boleh dibenarkan mendapat manfaat daripada tindakannya/mereka yang tidak jujur dan menyalahi undang-undang (lihat perenggan 7, 8, 10 & 12).]

Notes

For cases on policy of insurance, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 399–400.

Cases referred to

Beresford v Royal Insurance Co Ltd [1938] 2 All ER 602, HL (refd)
Charlton v Fisher and another [2001] 1 All ER (Comm) 769, CA (refd)
Cox v Orion Insurance Co Ltd [1982] RTR 1, CA (refd)
Geismar v Sun Alliance and London Insurance Ltd and another [1977] 3 All ER 570, QBD (refd)
Gray v Barr [1971] 2 All ER 949, CA (refd)

Legislation referred to

Road Transport Act 1987 ss 91(1), 96(3)

Joshua (Ajmer Sandhu & Ong) for the plaintiff.
Defendant acted in person.

Zamani A Rahim J:

FACTUAL BACKGROUND OF THE CASE

[1] The plaintiff is the insurer of motorcycle bearing registration No PHG 7157 of which the first defendant is the owner/insured.

[2] At the request of the first defendant and upon payment of a premium, the plaintiff issued a motor insurance policy to insure the first defendant against third party claims as required by s 91(1) of the Road Transport Act 1987. (exh 'RS 1' Afidavit Sokongan)

[3] The second and third defendants allege that the first defendant whilst riding motorcycle PHG 7157 collided into their motorcycle bearing registration No PGQ 815 on 15 October 2009 thus causing them injury, loss and damage, (police report No 15230/2009 exh 'RS 2').

[4] Initially the first defendant lodged police report No 15190/2009 on 19 November 2009 (ie approximately one month after the collision) admitting the alleged collision with the plaintiff's insured motorcycle, (exh 'RS 2').

[5] The plaintiffs commenced legal action in Butterworth Sessions Court vide Summons No 53–185–2011 for damages, interest and cost arising from the alleged accident.

[6] Only when the first defendant was brought to court he recanted his original police report and swore a statutory declaration that in fact motorcycle PHG 7157 (which was insured by the plaintiff) was not involved in any collision with the second and third defendants. And that his initial police report alleging the involvement of the insured motorcycle in the accident with the second and third defendants was done merely to enable them to make a claim against insurers for injuries suffered by them in consideration of being paid RM300 (refer exh 'RS 5' plaintiff's affidavit).

[7] The first defendant also lodged a police report to the same effect ie: neither he nor motorcycle PHG 7157 were involved in any collision with the second and third defendants (refer exh 'RS 6').

[8] The first defendant even testified in court to that effect. Refer to notes of proceedings in Butterworth Sessions Court 'RS 10' afidavit balasan plaintiff.

[9] Most interestingly, there is no affidavit in reply filed by either the second or third defendant categorically denying the facts averred to by the first defendant in his statutory declaration or police report.

ISSUES INVOLVED

[10] In light of the non-involvement of the plaintiff's insured motorcycle (PHG 7157) in any accident with the second and third defendants, the plaintiff seeks a declaration under s 96(3) of the Akta Pengangkutan Jalan, 1987 that the policy (in so far as the liability towards the second and third defendants for the claim filed in Butterworth Sessions Court vide summons No 53–185- of 2011) is unenforceable and the plaintiff be allowed to repudiate liability for the alleged accident.

Section 96(3) reads as follows:

> (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable.

The question which arises is when does a policy become void or unenforceable?

[11] In brief, according to the plaintiff's solicitors, a policy of insurance becomes void or unenforceable in the following circumstances:

(a) where it is a condition of the policy;

A (b) non-existence of actual risk to be covered;

(c) fraud or breach of duty of good faith; and

(d) public policy not to allow one to benefit from an illegal/unlawful act.

B

[12] I now propose to deal why the policy of insurance in respect of motorcycle PHG 7157 is unenforceable against the plaintiff by the defendants.

Condition of policy

C

[13] Refer to the basic insurance policy and covernote ie: exh 'RS 1' plaintiff's affidavit.

D **[14]** This document covers the liabilities, duties and obligations of the plaintiff and first defendant for there to be liability under the policy. The second and third defendants are not party to this contract of insurance and cannot dispute the terms of the policy.

E **[15]** The basic principle of law of contract — privity of contract — where one is not a party to a contract he cannot enforce or dispute the terms of the contract. The same applies for insurance contracts. Therefore the second and third defendants should not be allowed to question the acceptance or rejection of the risk under the insurance contract in respect of motorcycle PHG 7157.

F

[16] Turning now to the policy of insurance 'RS 1' in particular the 'General Exceptions' at p 3 of the policy:

> Para 3(a) Any loss damage or liability caused by Your Vehicle being used for an
G unlawful purpose or being used otherwise than in accordance with the Limitations as to use by You or some other persons with Your consent
>
> Para 9 If any liability attaches by virtue of an agreement but for which We would NOT have been liable in the absence of such agreement.

H

[17] The conduct of the first defendant in allowing the insured motorcycle to be used to make a non-existent claim clearly falls within these two exceptions of liability under the policy.

I **[18]** There is no rebuttal evidence led by the second and third defendants denying the existence of the agreement between the defendants to make a non-existent claim ie: the second and third defendants themselves have failed to affirm any affidavit denying the contents of the statutory declaration (SD) by the first defendant.

[19] Accordingly, it is very clear that pursuant to these two exceptions to the policy, it has become void or unenforceable and the plaintiff is not liable to indemnify the first defendant for any losses arising from him entering into the agreement with the second and third defendants to make a claim against the plaintiff for an accident which did not take place.

Non existence of risk to be covered

[20] Secondly, as there was in fact no accident between the motorcycles, there is no actual risk to be covered! Therefore the plaintiff cannot be held liable for something which did not occur. Please refer to *Halsburys Vol 25* para 510 and 511.

Fraud/breach of duty of good faith

[21] A contract of insurance is a contract which is *uberrimae fidei*. In plain English this means that it is a contract where the parties are under a *duty to exercise the utmost good faith.*

[22] This duty exists throughout the tenure of the contract and must be complied with by both the insurer and the insured (excerpt from *Principles of Insurance Law by Poh Choo Chai* (5th Ed) p 159).

DUTY OF GOOD FAITH

[23] Aside from the duty to disclose material facts to an insurer, there is also a duty on the insured to act in good faith when dealing with the insurer.

[24] Thus, in the present case, where the first defendant (insured) has allowed or facilitated the falsification of a claim to be made against the plaintiff (insurers) he (first defendant) is clearly acting in bad faith/dishonestly and has breached his duty under the policy.

[25] Such conduct on the part of the first defendant (insured) entitles the plaintiff (insurers) to not only repudiate liability under the policy but also to avoid the policy.

[26] Please refer to the passage in the textbook *Principles of Insurance Law* p 159 where the learned author quoted as follows:

> Section 17 Marine Insurance Act reads: A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.

> There is no doubt that a similar duty also applies in non-marine insurance … Thus, an insured would be acting in bad faith if he puts in a fraudulent claim as he would be acting dishonestly as well as breaching his duty of disclosure as he would not be disclosing matters which are material to his claim.

The statutory declaration ('RS 5') and the further police report ('RS 6') by the first defendant clearly proves beyond reasonable doubt the falsification of documents to facilitate a false claim by the second and third defendants under the policy of insurance.

[27] Accordingly, the plaintiff should be allowed to avoid the policy in view of the breach of the duty of good faith.

ILLEGALITY/DOCTRINE OF EX TURPI CAUSA AND PUBLIC POLICY

[28] Lastly, the policy must be held to be unenforceable as the first defendant has committed an unlawful or illegal act by fabricating his involvement in an accident and the defendants should not benefit from this dishonest and illegal act. This situation clearly brings to mind the celebrated Latin maxim *ex turpi causa, non oritur actio*.

[29] This rule is founded on a principle of public policy applicable to all contracts that a court will not assist a person who seeks to recover any kind of benefit or indemnity for his illegal acts, for to do so would be to remove a restraint upon the commission of illegal or unlawful acts.

[30] It would be an affront to public conscience to order the plaintiff to indemnify the first defendant whatever damages he may be found liable to pay the second and third defendants because the court would thereby appear to assist or encourage the first defendant in his illegal conduct.

[31] The cases which support of the said public policy, namely:

(a) *Geismar v Sun Alliance and London Insurance Ltd and another* [1977] 3 All ER 570:

(b) *Charlton v Fisher and another* [2001] 1 All ER (Comm) 769 where the English Court of Appeal succinctly held that:

> The general principle that a person might not stand to gain and advantage arising from the consequences of his own iniquity applied in relation to motor insurance contracts as it did elsewhere, and for the most purposes had the same effect as if the policy was worded so as not to apply to damage arising from the insured's own deliberate criminal act.

It was similarly held in earlier cases such as:

(c) *Cox v Orion Insurance Co Ltd* [1982] RTR 1 (CA) excerpt from the textbook *The Modern Law of Insurance* (3rd Ed) by Mc Gee p 273 where the claimant held motor insurance. After an accident he submitted a claim, the particulars of which were false in material respects. It was held that the insurers were entitled to repudiate liability on this ground;

(d) *Gray v Barr* [1971] 2 All ER 949;(CA) and

(e) *Beresford v Royal Insurance Co Ltd* [1938] 2 All ER 602 (HL) where the Court of Appeal held:

> It is the over-riding duty and inherent power of the court to refuse its aid to enforce a promise here the plaintiff has to set up his own crime or the estate plaintiff a deceased seeks to benefit from a crime of the deceased.

[32] The House of Lords upheld the decision of the Court of Appeal.

[33] The Malaysian High Courts too have ordered that fraudulent claims are unenforceable as can be seen in several High Court orders. (see Mahkamah Tinggi Kuala Lumpur (Bahagian Sivil) Saman Pemula No 24 NCVC-2514-10/2012, Mahkamah Tinggi Pulau Pinang (Bahagian Sivil) Saman Pemula No 24-848-05/2012, Mahkamah Tinggi Kuala Lumpur (Bahagian Sivil) Saman Pemula No 24 NCVC-560-03/2013, Mahkamah Tinggi Kuala Lumpur (Bahagian Sivil) Saman Pemula No 24 NCVC-380-02/2013.)

[34] Accordingly, the falsification of involvement in the accident with the second and third defendants by the first defendant (insured) vide the initial police report, was an illegal act by the first defendant. He should not be allowed to benefit by it by making the plaintiff indemnify the second and third defendants for any judgment that he (first defendant) is found liable to pay them.

[35] Therefore, in the circumstances this court ought to allow the plaintiff's summons to avoid liability under the insurance policy. In fact the High Court has regularly allowed such summonses by the insurers.

[36] In the present case too it would be against public policy to hold the plaintiff liable to indemnify the defendants for an accident which did not in fact occur as admitted by the first defendant himself.

[37] In reply to the plaintiff's submission, the second and third defendants have only raised three issues in their submission, namely:

(a) the plaintiff's summons is based purely on the first defendant denial of involvement contained in his statutory declaration (SD);

(b) no other evidence of non-involvement of the first defendant; and

(c) special circumstances.

[38] Below are the issues raised by the second and third defendant solicitors and my consideration thereof.

(a) The plaintiff cannot avoid liability purely on the first defendant's averment in statutory declaration (SD)

[39] To this issue there is no valid reasons for the plaintiffs cannot avoid liability based on first defendant's averment in the SD.

[40] In insurance cases the insurers (plaintiff) take on/accept liability on the information of the involvement of their insured in an accident. Usually this is by way of insured's police report stating that he was involved in any particular accident.

[41] What initially happened in this case, the insurers (plaintiff) accepted liability when informed of the accident and appointed solicitors to defend their insured (first defendant).

[42] Subsequently, the insured himself has sworn a SD stating that he was not involved in the accident with the second and third defendants. The insured even lodged a corrective police report to this effect. He even testified in court to this effect!

[43] A contract of insurance is between an insured and his insurer. Now the insured is telling the insurer categorically that 'I'm NOT involved in this accident. It is a scam!' Why the insurers should not act on his statement and avoid the policy?

[44] The second and third defendants are not privy to the contract between the plaintiff and the first defendant and therefore cannot dictate whether the insurers should indemnify the first defendant or not. This is a simple law of contract.

(b) No evidence to show that first the defendant not involved in the accident with the second and third defendants

[45] In this originating summons (OS) filed by the plaintiff we are not concerned with proving whether the accident occurred or not. That is for the sessions court to decide.

[46] In this OS, the plaintiff is asking this court to grant an order that the insurers may avoid liability under the policy where the insured himself is saying categorically by way of SD (exh 'RS5'), police report (exh 'RS6') and testimony in court (exh 'RS10') that he was never involved in an accident.

[47] Between the insurers and the first defendant (insured) there is overwhelming evidence that there has been a breach of the duty of good faith and false declaration of involvement in an accident has been made which allows the plaintiff (insurers) to avoid the policy.

(c) Special circumtances

[48] The issue of special circumstances is only relevant in applications for stay of execution or stay of proceedings.

[49] Here, plaintiff is not asking for an order to stay execution. Therefore, this issue raised by the plaintiff is inappropriate and bears no relevance to the issues at hand.

CONCLUSION

[50] As discussed above, the plaintiff's right to seek this declaration pursuant to s 96(3) of the Road Transport Act 1987 is based on the following reasons:

(a) exceptions stipulated in the policy itself;

(b) non-existence of actual risk as accident did not occur;

(c) iniquity of the first defendant in giving a false police report implicating himself in an accident which did not occur;

(d) breach of the duty of utmost good faith between insurer and insured;

(e) defendants should not benefit from an illegal act such as seeking compensation/indemnity for a claim which did not even exist — *ex turpi causa, non oritur* action; and

(f) public policy against allowing false claims to be upheld by the courts.

[51] The second and third defendants are not privy to the contract of insurance and cannot therefore challenge the plaintiff's right to avoid liability in the circumstances of the case.

[52] Accordingly, I order in terms of paras (a), (b), (c) of the amended

originating summons, attachment 8 and a cost of RM1,000 payable by each defendant ie first, second and third defendant's to the plaintiff.

Application granted.

Reported by Ashok Kumar